2016 IL App (2d) 131231-U
No. 2-13-1231
Order filed April 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GARY W. SCHUNING, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 06-CF-713 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by summarily dismissing defendant's *pro se* postconviction petition; therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Gary W. Schuning, was found guilty of first-degree murder for the stabbing deaths of two people (720 ILCS 5/9-1(a)(1) (West 2006)) and sentenced to life imprisonment. Defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). In his petition, defendant alleged that appellate counsel was ineffective for failing to argue that his first statement to police at the hospital was made without a voluntary and intelligent waiver of his rights under *Miranda v. Arizona*, 384 U.S.

436 (1966), and was not voluntary. He also alleged that both trial and appellate counsel were ineffective for failing to call a necessary witness at the suppression hearing, and for failing to raise that issue on appeal, respectively. The trial court summarily denied defendant's *pro se* postconviction, and he appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 26, 2006, around 9:15 a.m., police officers were dispatched to defendant's house, where they found defendant's mother and an escort stabbed to death. Defendant, who had suffered serious stab wounds to his chest and abdomen, told police that the escort had killed his mother. Defendant was transported to the hospital, where he made two statements to police over the next two days (February 27 and 28). Defendant made a third statement to police at the police department on March 7. Defendant moved to suppress all three statements, and the trial court denied defendant's motion to suppress the first statement but granted his motion to suppress the other two statements. The State appealed the suppression of defendant's second and third statements, and this court affirmed the ruling based on defendant's invocation of his fifth amendment right to counsel. *People v. Schuning*, 399 Ill. App. 3d 1073, 1090 (2010).

¶ 5 A. First Statement

¶ 6 Defendant's postconviction petition relates only to the first statement he made to police. Thus, we summarize the relevant evidence from the November 2008 suppression hearing pertaining to that statement.

¶ 7 Detective Brian Goss of the Addison police department testified that he and another detective, Sean Gilhooley, questioned defendant at the hospital on February 27, 2006. The detectives arrived at the hospital at 9:50 a.m. Upon their arrival, they learned that defendant had

undergone open-heart surgery and had been placed into a drug-induced coma. In addition, defendant could not talk due to a tube in his throat.

¶ 8 Prior to entering defendant's hospital room, Goss spoke to defendant's nurse and asked if they could talk to defendant. The nurse advised that the tube would be taken out of defendant's throat and that he was being taken off of Propofol, which had put him in a twilight state. The nurse said that the Propofol took 60 to 90 minutes to wear off. At 11:15 a.m., the nurse informed the detectives that defendant was in and out of sleep and that the Propofol was almost out of his system.

¶ 9 The detectives waited in defendant's room, and the doctor removed defendant's tube around 1:10 p.m. The doctor then advised the detectives to wait 30 to 60 minutes before talking to defendant. Defendant could have ice chips but not straight liquids at that point. After the tube was removed, the nurse, on three different occasions, asked defendant questions about his name and where he was and "things like that." The detectives began questioning defendant at 2:26 p.m. They had waited over one hour, and defendant had answered the nurse's questions appropriately. Defendant was hooked up to an IV bag that Goss later learned was patient-controlled morphine. Goss never saw defendant press the button that administered the morphine.

¶ 10 Goss audio taped the interview, which he concealed from defendant by putting the recorder in his pocket. The audio tape was played for the trial court and indicated as follows.

¶ 11 The detectives introduced themselves to defendant and said that they wanted to talk to him "about some stuff." The detectives remarked that defendant was likely "confused about some stuff and probably" had questions for them as well. Officer Gilhooley then said "But before I talk to you, I gotta give you something called your rights. Ok? It is often known as your Miranda rights. I am gonna read your Miranda rights to you. Ok? Just like you kind of see

on TV. And I don't know if the police officer read them to you before." After each right was read to defendant, defendant was asked if he understood, and he replied that he did. In addition, after all of the rights had been read, detectives asked if he understood his rights, to which defendant replied "yes."

¶ 12 The detectives asked how defendant was being treated at the hospital, and he replied that he "hurt all over," especially his torso area. When asked, defendant remembered seeing police officers at his house the day before. Defendant had been at home with his mother and an escort; he had called two girls for companionship. Gilhooley reiterated that he wanted to get defendant's "side of the story as to what happened." When asked if defendant had been out with a friend the night before, defendant said he could not talk and needed some ice chips. The detectives gave defendant some ice chips and said to let them know when he needed more ice chips or anything else.

¶ 13 Defendant continued that that he went to a club with some friends, where he drank and snorted cocaine. Defendant then drove home and called some escort services. At first, defendant said that an escort came to his house, killed his mother, and then attacked him. The detectives told defendant to tell the truth and to think of his family, who needed closure. When defendant said that he did not kill his mother and that he killed the escort in self-defense, the detectives told him that his version did not match up with what they already knew from evidence technicians and the medical examiner at the scene. Gilhooley said that defendant seemed like "a good kid" and that "so far" defendant had been "real nice." Gilhooley reiterated that they wanted to get "the truth from defendant as to exactly how it happened." The detectives told defendant that he was leaving some things out; that he had been cooperative; and that they needed his side of the story. When Goss asked about defendant's mother falling down the stairs, Goss said that "you

have to answer this. I need a yes or a no." Defendant then admitted that he pushed his mother down the stairs. Eventually, after the detectives said that defendant's version was not matching up with the physical evidence, defendant admitted stabbing his mother in the chest. Defendant then wrapped his mother in a blanket, picked her up, and placed her in her bedroom.

¶ 14 Defendant said that after that, the first escort arrived and saw blood on the wall. Defendant told the escort that he had had a party and that it was vomit. Defendant left the house with that escort to retrieve money from a cash station, and then they returned to his house and had sex. The first escort left and a second escort (the victim), arrived. According to defendant, the second escort went into the bathroom, came out with a knife, and attacked him. Defendant killed her in self-defense. The detectives then told defendant that his injuries were not consistent with his story or with the 911 call in which the escort said, "What's in your hand? Oh my God! Oh my God!" The detectives asked repeatedly what was in defendant's hand during the 911 call, and defendant said he did not know. The detectives said that "you have got to work with us my man" and to think about what his grandfather would want him to do, which was to "stand up and tell the truth." The detectives said they knew the answers to a lot of the questions they were asking. At first, defendant told the detectives that he was getting "sliced on the wrist," but later he admitted slashing his own wrists because he wanted to die. Defendant claimed that the escort stabbed him in the chest and stomach but the detectives said "hesitation marks" suggested that some of his wounds were self-inflicted. He then admitted trying to stab his own chest.

¶ 15 Near the end of the interview, defendant told the detectives to put him "to sleep"; that he would go to prison for the rest of his life; that he had been the "perfect parolee"; and that now he was insane. Defendant also noticed the audio recorder and twice said to "keep recording that." When the detectives commented on defendant's awareness that they were recording the

interview, defendant said that he "knew" the officers had to record it, and he said he "knew" he "didn't have to say anything" to the detectives. The interview ended at 3:11 p.m.

¶ 16 Goss resumed his testimony at the suppression hearing, stating as follows. Aside from defendant's throat being hoarse, Goss could tell what defendant was saying and what he wanted to say. At times, defendant would shake his head yes or no, and the detectives would ask him to talk louder because of the audio tape. Also, defendant moved his hands while talking, "like in a normal conversation." Occasionally, defendant was upset during the interview or defensive. At one point, an automatic blood pressure cuff tightened around defendant's arm, and defendant looked around to see what was causing the sensation. Goss explained that it was his blood pressure cuff. Over the course of the interview, defendant's speech and cadence improved in clarity, and he answered appropriately at all times.

¶ 17 B. Court's Decision

¶ 18 Regarding this first statement to police, the trial court noted that defense counsel had argued that defendant's medical and physical condition, in terms of his injuries, surgery, and medications, raised a question as to his capability of knowingly and voluntarily waiving his *Miranda* rights. According to the court, the ultimate issue of whether defendant knowingly and voluntarily waived his *Miranda* rights and gave a voluntary statement to police, or whether he was coerced or influenced by medication, was contained in the tape itself.

¶ 19 The court stated that there was no question that defendant's *Miranda* rights were read to him and that he did, in fact, respond. Although defendant made much of the fact that he had a hard time speaking after the tube was removed, due to his throat being irritated, the court noted that defendant's ability to speak became stronger as the conversation continued. Defendant's improved ability to speak came not from any improving mental condition but rather from being

given ice chips. Also, the detectives were informed by both the doctor and the nurse that defendant was capable of being interviewed. The nurse specifically indicated that defendant was oriented as to time and place and circumstances, and the detectives received this information prior to interviewing defendant. In addition, there was no evidence describing the medications or effects of medication on defendant. According to the court, it paid particular attention to defendant's ability to respond to questions, to answer questions, and to provide information, especially information that was not being fed to him in any leading manner. In total, the court was "struck with a very clear indication the defendant was capable of understanding where he was, what he was doing, who he was speaking to, what his *Miranda* rights were." Defendant was "certainly" aware that he was speaking to the police, and he also had had prior experience with law enforcement, which he alluded to during the interview.

¶ 20 The court further noted that defendant's initial position was that the escort killed his mother. When the detectives challenged his claim, however, defendant changed his story and provided specific details. Defendant "was not led into or fed into this but certainly was challenged and when challenged," he admitted that he had pushed his mother down the stairs and stabbed her. At the end of the interview, defendant acknowledged the consequences of what he had said and what would happen to him as a result of what he had done. One "Kodak moment" for the court was defendant's statement to " 'keep recording that.' " "And in the context of the officer's testimony," which the court found "quite credible on all these points," there was a clear indication that "defendant was not only aware of what he was saying and who he was saying it to, what the consequences were, and that he knew and understood that he was talking to the police." According to the court, "any fair listening" of the audio tape and "consideration of the

testimony" clearly revealed "beyond any question" that defendant "knowingly and voluntarily waived his [*Miranda*] rights and made that statement."

¶ 21 C. Trial and Direct Appeal

¶ 22 Defendant's trial commenced in May 2011. The State's case included multiple witnesses, this first statement to police, and forensic evidence. Defendant then testified on his own behalf. Also testifying on behalf of defendant was expert witness Dr. Ruth Kuncel, who testified as follows.

¶ 23 Kuncel was an expert in forensic and clinical psychology. In 2010, she administered several psychological, intelligence, memory, and personality tests on defendant, spending approximately 22 hours with him. Kuncel opined that defendant likely had very little independent recollection of events based on the severe physical and emotional distress he was experiencing at the time. Defendant's background of a demanding stepfather and loving grandfather made him susceptible to "good cop, bad cop" interrogation. He also had very poor short-term memory and was prone to confabulation, a phenomenon in which elements that were not there originally were added to a story. When Kuncel opined that defendant's admission that he stabbed his mother could be a confabulation, the court instructed the jury to disregard that testimony. Throughout Kuncel's testimony, the court instructed the jury that no witness was allowed to opine about whether or not defendant was guilty of committing the acts.

¶ 24 In reviewing what transpired during the detectives' interview of defendant, Kuncel stated their tactics included befriending him and treating him like a "pal," accusing him of lying if he deviated from the detectives' story, creating a sense of guilt by saying that his family needed closure, and minimizing his conduct. In Kuncel's opinion, defendant provided police with an "internalized coerced false confession."

¶ 25 The jury found defendant guilty of first-degree murder for the stabbing deaths of his mother and the escort. Defendant was sentenced to life imprisonment.

¶ 26 Defendant appealed, arguing that trial counsel was ineffective for failing to request an instruction on self-defense or, in the alternative, an instruction on second-degree murder regarding the escort's death. This court rejected defendant's argument and affirmed his convictions on appeal. See *People v. Schuning*, No. 2-11-0775 (2013) (unpublished order under Supreme Court Rule 23).

¶ 27 D. Postconviction Petition

¶ 28 Defendant filed a *pro se* postconviction petition on August 20, 2013. In his petition, defendant raised six general points, two of which are relevant on appeal. First, he alleged that appellate counsel was ineffective for failing to argue that his statement to police should have been suppressed based on an invalid waiver of his *Miranda* rights and based on it not being voluntary. Second, defendant alleged that both trial and appellate counsel were ineffective in regard to witness Kuncel's expert opinion that his statement to police was coerced and false. The trial court summarily dismissed defendant's postconviction petition at the first stage. According to the court, the petition was frivolous and patently without merit and lacked supporting affidavits.

¶ 29 Defendant timely appealed.

¶ 30 II. ANALYSIS

¶ 31 The Act provides a method for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23. In a noncapital case, a postconviction proceeding contains three stages. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, which

is the situation here, the trial court examines the petition independently, without input from the parties. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Taking the allegations as true, the trial court must determine whether the petition is frivolous or is patently without merit. *Tate*, 2012 IL 112214, ¶ 8. A *pro se* postconviction petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Brown*, 236 Ill. 2d at 184-85. "A petition lacking an arguable basis in law or fact is one 'based on an indisputably meritless legal theory or a fanciful factual allegation.' " *Id*. (quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). A claim that is completely contradicted by the record is an example of an indisputably meritless legal theory, and a trial court may consider the court file of the criminal proceeding, any transcripts of the proceedings, and any action by the appellate court. *Id*. at 184-85. We review the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 32 A. Sufficiency of the Petition

¶ 33 Before turning to the merits of defendant's arguments, we address the State's argument that defendant's failure to attach any supporting documentation to his *pro se* postconviction petition is fatal. See 725 ILCS 5/122-2 (West 2012) (The "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."). For its argument, the State relies on *People v. Collins*, 202 Ill. 2d 59, 69 (2002), in which our supreme court stated that the trial court properly dismissed the defendant's *pro se* postconviction petition as frivolous and patently without merit because it failed to include affidavits, records, or other supporting evidence. Also, the defendant failed to explain why such supporting evidence was lacking. *Id*. The State concludes that defendant's failure to address the lack of supporting documentation in his initial brief results in forfeiture of this issue on appeal.[1]

[1] In a motion taken with the case, and over defendant's objection, we grant the State's

¶ 34 We disagree with the State's forfeiture argument given that defendant properly responded to the State's contention in his reply brief. See Ill. S. Ct. R. 341(j) (eff. Feb. 6, 2013) (reply brief shall be confined strictly to replying to arguments presented in the brief of the appellee). As a preliminary matter, defendant points out that he did in fact attach an affidavit explaining that he had tried to obtain affidavits and other documentation supporting his claims but was unable to do so. Defendant's stated explanations included being incarcerated, lacking legal experience and needing the assistance of counsel, and not knowing what to ask for or what evidence was available. Therefore, defendant offered an explanation as to why supporting evidence was lacking.

¶ 35 In addition, and more importantly, defendant points out that the arguments from his postconviction petition that he has raised on appeal are based entirely on the record, meaning that additional supporting documentation is not required. See *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 64 (the absence of affidavits is not fatal to a postconviction petition if the petition finds support in the record). In other words, section 122-2 (725 ILCS 5/122-2 (West 2012)) requires the attachment of "affidavits, records, or other evidence supporting its allegations," which in this case is the record itself. Because defendant's postconviction claims may be resolved based on the record alone, defendant's failure to attach supporting documentation is not fatal to his *pro se* postconviction petition.

¶ 36 B. Ineffective Assistance of Counsel

¶ 37 On appeal, defendant argues that the trial court erred by summarily dismissing his *pro se* postconviction petition because it stated arguably meritorious claims of ineffective assistance of

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motion for leave to file a surreply brief, *instanter*. See *Bremer v. City of Rockford*, 2015 IL App (2d) 130920, ¶ 15 n.1 (granting leave to file a surreply brief, *instanter*).

trial and appellate counsel. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hodges*, 234 Ill. 2d at 17. Under this two-prong test, a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "A claim of ineffective assistance of appellate counsel is governed by the same rules that apply to claims of ineffective assistance of trial counsel." *People v. Moore*, 402 Ill. App. 3d 143, 146 (2010). In particular, the defendant must establish that appellate counsel's failure to raise a particular issue on direct appeal was objectively unreasonable and that he was prejudiced by that failure. *Id*. at 146-47. Defendant's claims of ineffective assistance of trial and appellate counsel are in the context of the first stage of postconviction proceedings. At the first stage, a petition alleging ineffective assistance may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced. *Coleman*, 2012 IL App (4th) 110463, ¶ 49.

¶ 38 1. *Miranda* Waiver

¶ 39 Defendant's first argument on appeal is that appellate counsel was ineffective for failing to challenge the trial court's determination that his first statement was made after a voluntary, knowing, and intelligent waiver of his *Miranda* rights. In arguing that the State failed to show a valid waiver of his *Miranda* rights, defendant argues that: (1) the detectives never asked him whether he wished to waive his rights and speak to them, or to waive his rights in writing; (2) defendant's physical condition arguably precluded him from full awareness of his rights at the

time he was questioned, in that he was lying in pain in the ICU, 24 hours after undergoing open-heart surgery and being placed in a medically-induced coma; (3) his overall demeanor suggested mental deficiencies, based on his low tone of voice and slurring of words; (4) the detectives immediately questioned him after reading him his rights, implying that he had no choice but to speak to them; (5) initially, the detectives downplayed any intent to use his statements against him and failed to prove that he was aware of their intent to use his statements against him; and (6) after initially engaging in a non-accusatory conversation with him, they quickly shifted the tone of the conversation, telling him that he "had" to answer their questions and give his family closure.

¶ 40 "Prior to police questioning, a person must be warned that he or she has the right to remain silent, that any statement that person makes may be used as evidence against him or her, and that he or she has the right to the presence of an attorney." *People v. Tuson*, 2016 IL App (3d) 130861, ¶ 22. A valid waiver of *Miranda* rights must be knowingly and intelligently made. *People v. Braggs*, 209 Ill. 2d 492, 515 (2003). "A valid waiver of *Miranda* rights occurs where: (1) the decision to relinquish those rights was voluntary in the sense that it was not the product of intimidation, coercion, or deception; and (2) it was made with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them." *People v. Brown*, 2012 IL App (1st) 091940, ¶ 25. The validity of a *Miranda* waiver is a question of fact, and it must be determined based on the totality of the circumstances (*id.*), including the background, experience, and conduct of the defendant (*Braggs*, 209 Ill. 2d at 515). Unless these warnings are given and the defendant voluntarily, knowingly and intelligently waives these rights, the defendant's statement to police should be suppressed. *Tuson*, 2016 IL App (3d) 130861, ¶ 22.

¶ 41 For the following reasons, we reject defendant's claim that it is arguable that appellate counsel was deficient for failing to raise the issue of the validity of his *Miranda* waiver on appeal. First, regarding defendant's argument that he was not asked if he wished to waive his rights, we note that the detectives clearly advised defendant that before they were able to talk to him and explain things, or answer any of his questions, they had to give him "something called your rights." The detectives continued: "Ok? It is often known as your *Miranda* rights. I am gonna read your *Miranda* rights to you. Okay?" Therefore, though not required, the detectives did in fact ask permission to read defendant his *Miranda* rights prior to questioning him. Second, defendant's complaint that the waiver was not in writing also fails, in that a written waiver is not required. See *People v. Foster*, 195 Ill. App. 3d 926, 947 (1990) (an express written *or* oral statement of waiver of a defendant's right is usually strong proof of the validity of the waiver). The audio tape clearly reveals that the detectives read each right to defendant and then specifically asked whether he understood each right, to which he replied yes. Third, defendant had prior experience with law enforcement and was on parole at the time he was questioned. Thus, defendant's background and experience supports the conclusion that he knowingly and intelligently waived his *Miranda* rights.

¶ 42 Turning to defendant's physical and mental condition at the time he was questioned, Goss testified that, according to the nurse, the Propofol was nearly out of defendant's system at 11:15 a.m., and the tube in his throat was removed around 1:10 p.m. Defendant's doctor advised the detectives that they could speak to defendant in 30 to 60 minutes after the tube was removed, but they waited over one hour, until nearly 2:30 p.m. to begin questioning him. As a result, the detectives did not begin questioning defendant until over three hours after the Propofol had worn off. Defendant's mental capacity to be interviewed was confirmed by the nurse's questioning of

defendant, on three separate occasions after the tube was removed, regarding what defendant's name was, where he was, and "things like that." Defendant answered the nurse appropriately, and the trial court found Goss's testimony to this end credible. The court noted that based on Goss's testimony, the detectives were informed by both the nurse and the doctor that defendant was capable of being interviewed, with the nurse confirming that defendant was oriented as to time and space. Other than defendant's conclusory assertions, the court recognized that there was no evidence that the medications administered to defendant adversely affected him. Rather, the court was "struck with a very clear indication the defendant was capable of understanding where he was, what he was doing, who he was speaking to, what his *Miranda* rights were." As the court found, the audio tape revealed that defendant's improved ability to speak was not the result of an improving mental condition, but because he was given ice chips. Thus, the testimony at the suppression hearing belies defendant's argument with respect to his physical condition and mental capacity at the time he was questioned.

¶ 43 Finally, many of defendant's arguments regarding the tactics of the police relate not to the *Miranda* warnings, but to the voluntariness of the confession itself, which we discuss below. In any event, at the end of the interview, defendant not only recognized that the interview was being recorded, he twice said to "keep recording that." Contrary to defendant's assertion, he was aware of the consequences of what he said to police, stating that he knew he would be sent to prison for what he did. Based on defendant's comments, the court was convinced that defendant knew the consequences of what he was saying to the detectives. See *Brown*, 2012 IL App (1st) 091940, ¶ 25 (a valid waiver of *Miranda* rights occurs where the decision to relinquish those rights was voluntary and made with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them).

¶ 44 This court has reviewed the record and listened to the audio tape, and defendant has given this court no reason to disturb the trial court's findings on this issue. See *People v. Crotty*, 394 Ill. App. 3d 651, 655 (2009) (in reviewing a ruling on a motion to suppress, the trial court's findings of fact will be reversed only if they are against the manifest weight of the evidence). Because there is no merit to defendant's claim that his waiver of his *Miranda* rights was not valid, appellate counsel cannot be defective for failing to raise this issue on appeal. See *People v. English*, 2013 IL 112890, ¶ 34 (appellate counsel is not required to raise issues that he reasonably determines are not meritorious). Also, because defendant has failed to show that appellate counsel was defective under the first prong of *Strickland*, we need not consider the prejudice prong. See *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008) (the court need not consider both the deficiency prong and the prejudice prong of the *Strickland* test if a defendant fails to show one prong).

¶ 45 2. Voluntariness of Confession

¶ 46 In a related argument, defendant argues that appellate counsel should have raised the issue of whether his statement was involuntary. To determine whether a confession is voluntary, courts consider the totality of the circumstances, such as the defendant's age, intelligence, background, experience, education, mental capacity, and physical condition at the time of questioning. *People v. Murdock*, 2012 IL 112362, ¶ 30. Additional factors to be considered include the duration and legality of the detention, the presence of *Miranda* warnings, and whether there was any physical or mental abuse by the police. *Id*. No one factor is dispositive. *People v. Willis*, 215 Ill. 517, 536 (2005). The test of voluntariness is whether the confession was made freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession. *Murdock*, 2012 IL 112362, ¶ 30.

¶ 47 Defendant contends that it is arguable that his physical condition and the nature of the interrogation rendered his statement involuntary. Specifically, defendant argues that he was isolated in the ICU and hooked up to medical devices; he told the detectives that he was in a great deal of pain; he was confused and unable to think clearly, as evidenced by his confusion over the tightening blood pressure cuff; and after defendant told the detectives that he thought that the escort killed his mother and that he killed the escort in self-defense, the detectives engaged in numerous tactics to get him to confess. In particular, the detectives said that they did not believe defendant's story; that evidence technicians were already at the scene finding evidence that conflicted with his story; that defendant seemed like a good kid and should tell the truth; that defendant's family needed closure; and that he "had" to answer their questions. Defendant argues that all of these conditions arguably created a coercive environment in which his will was overborne, leading him to provide a confession that was involuntary.

¶ 48 For many of the same reasons that there is no merit to defendant's argument that he did not validly waive his *Miranda* rights, there is no merit to defendant's argument that his confession was involuntary. As stated, both the doctor and the nurse informed the detectives that defendant was capable of being questioned, and defendant was oriented as to time and place and to his circumstances. Defendant never administered morphine during the interview, and as the trial court noted, there was no evidence that any medications administered prevented him being questioned. Also, once Goss explained to defendant that his blood pressure cuff was tightening, defendant understood. Goss testified that defendant answered questions appropriately at all times, even talking with his hands, as in a normal conversation. The court found Goss's testimony credible, especially in light of the audio tape. The trial court, in finding defendant's confession voluntary, stated that it paid particular attention to defendant's ability to respond to

questions, to answer questions, and to provide information. The court found that overall, defendant was "certainly" aware of where he was, what he was doing, and to whom he was talking. Also, the entire interview was not long, approximately 37 minutes, and rather than getting tired, defendant's speech and cadence improved throughout the interview. Indeed, at the end of the interview, defendant's mental capacity was such that he discovered that the interview was being recorded, which the court characterized as a "Kodak moment."

¶ 49 Based on these circumstances, the case at bar is very different than the cases relied on by defendant. First, in *Mincey v. Arizona*, 437 U.S. 385, 396 (1978), the defendant, who was also in the hospital, was unable to talk because of a tube in his mouth, thus forcing him to respond to the officer's questioning by writing answers on pieces of paper. Unlike defendant here, the defendant in *Mincey* asked for an attorney; he asked not to be interrogated; and his written answers were not entirely coherent. *Id*. at 398-400. Second, in *People v. Dennis*, 373 Ill. App. 3d 30 (2007), the defendant was also questioned by a detective while in the hospital, but the detective did not ask any attending medical personnel whether he could interview the defendant, and *Miranda* warnings were not given prior to the statements made in the hospital. *Id*. at 45-46. Simply put, the concerns in *Mincey* and *Dennis* are not present here.

¶ 50 We also reject defendant's assertion that his will was overborne by the tactics of the detectives. As mentioned previously, defendant had prior experience with law enforcement. In addition, the court found that when defendant changed his story, he was not "fed" or coerced as to what to say, but offered his own details as to what occurred. By challenging defendant's version of events and encouraging him to tell the truth for the sake of his family, the detectives did nothing improper. See *People v. Westmorland*, 372 Ill. App. 3d 868, 877 (2007) (the test for voluntariness is not whether the defendant wanted to confess or would have confessed in the

absence of interrogation; suspects typically do not confess to the police purely of their own accord). Interrogation by its nature is confrontational, and courts have permitted much more aggressive interrogations. *Cf. People v. Macias*, 2015 IL App (1st) 132039, ¶ 63 (noting the confrontational nature of interrogations, the court found the defendant's confession voluntary despite an aggressive interrogation that included yelling, profanity, and vulgarity). Rather than a situation where defendant's will was overborne, the audio tape reveals the opposite. At the end of the interview, defendant twice told the detectives to "keep recording that"; he recognized that he would go to prison for killing his mother; and he admitted, without any prompting by the detectives, that he did not have to talk to the detectives at all. In sum, as the trial court found, "any fair listening" of the audio tape and consideration of the testimony clearly revealed "beyond any question" that defendant's confession was voluntary.

¶ 51 Because defendant has not presented this court with any reason to disturb the court's finding that defendant's confession was voluntary, there is no merit to defendant's claim that his confession was involuntary. Accordingly, appellate counsel cannot be defective for failing to raise this issue on appeal (see *English*, 2013 IL 112890, ¶ 34), and we need not consider the prejudice prong of the *Strickland* test (see *Irvine*, 379 Ill. App. 3d at 130).

¶ 52 3. Necessary Witness

¶ 53 Defendant's final argument on appeal is that both trial and appellate counsel were arguably ineffective in regard to the opinion testimony of expert Kuncel. Defendant argues that Kuncel's testimony directly addressed the issues raised in the suppression hearing regarding the voluntariness of his statement to police. Kuncel opined that based on defendant's mental and physical condition, as well as the interrogation tactics by the detectives, his statement was coerced and false. Based on her opinion, defendant argues that trial counsel was deficient for

failing to have her testify at the suppression hearing. Recognizing the fact that the suppression hearing occurred in 2008, whereas Kuncel's report was not completed until 2010, defendant argues that, at the very least, trial counsel should have asked the court to reconsider its pretrial ruling denying his motion to suppress once she testified at trial. Likewise, defendant argues that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness in this regard.

¶ 54 The decision of which witnesses to call is a matter of trial strategy within the discretion of trial counsel. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26. "Such a decision comes with the strong presumption that it is a product of sound trial strategy, and it is generally immune from claims of ineffective assistance of counsel." *Id*. In determining the admissibility of expert testimony, trial judges are given broad discretion. *People v. Cardamone*, 381 Ill. App. 3d 462, 500 (2008). The modern standard for the admissibility of expert testimony is not whether the subject is beyond the understanding of the jury, but whether the testimony will aid the jury's understanding. *Id*. An expert witness may provide an opinion on the ultimate issue in a case, and the trial court should carefully consider the necessity and relevance of the expert testimony in light of the facts in the pending case. *Id*.

¶ 55 While there are many cases discussing the admissibility of expert testimony at trial, our research has not revealed a similar case in which the defendant sought to admit expert testimony of a false confession at a suppression hearing. Nevertheless, we determine that trial counsel was not deficient for failing to call Kuncel as a witness at the suppression hearing or for moving to reconsider the trial court's pretrial ruling after she testified at trial. This is because Kuncel's opinion was either not relevant to the suppression hearing or contained a legal conclusion that infringed on the trial court's role in determining whether the confession was voluntary.

¶ 56 As stated, Kuncel opined that defendant's statement was both false and coerced. With respect to Kuncel's opinion that defendant's statement to the detectives was false, we agree with the State that this testimony was not relevant to the ultimate issue in the suppression hearing, which was whether the statement was voluntary. Whether a statement is voluntary is a separate issue from whether it is false or reliable. See *People v. Hughes*, 2015 IL 117242, ¶ 42 (noting that even where a confession has been determined to be voluntary, a defendant might still attack it as unreliable or false). Because Kuncel's opinion that the statement was false pertained to the reliability of the statement, rather than the voluntariness of the statement, it was not relevant for the court's ruling at the suppression hearing. See *Cardamone*, 381 Ill. App. 3d at 500 (the test is whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue).

¶ 57 As for Kuncel's opinion that defendant's statement was coerced, a finding of coercion is a legal conclusion regarding the ultimate issue of whether the statement was voluntary. See *Murdock*, 2012 IL 112362, ¶ 30 (the test of voluntariness is whether the confession was made freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession). While it is true that an expert is allowed to offer an opinion on the ultimate issue in the case, it is also true that an expert is not allowed to offer legal conclusions that infringe on the fact finder's duties. See *People v. Munoz*, 348 Ill. App. 3d 423, 440 (2004) (applying this legal standard for experts in civil cases to a criminal case). Just as the trial court prohibited Kuncel from testifying as to the legal conclusion of whether defendant actually killed his mother and the escort at trial, Kuncel would not have been able to testify as to the legal conclusion of whether defendant's statement was coerced and thus involuntary at the suppression hearing. Kuncel's opinion would have improperly infringed

on the trial court's role of considering whether, under the totality of the circumstances, defendant's statement was voluntary. Because Kuncel's opinion had no place in the trial court's decision at the suppression hearing, trial counsel was not deficient for failing to call her to testify at that hearing or for failing to move to reconsider the court's ruling. For the same reason, appellate counsel was not deficient for failing to raise this issue on appeal. Thus, defendant's postconviction petition failed to state arguably meritorious claims of ineffective assistance of trial and appellate counsel.

¶ 58 III. CONCLUSION

¶ 59 For the foregoing reasons, defendant's *pro se* postconviction petition was frivolous and patently without merit. Accordingly, we affirm the judgment of the Du Page County circuit court summarily dismissing defendant's *pro se* postconviction petition.

¶ 60 Affirmed.